

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal no.1427 of 2005

1. Shri Namdeo Kedari Nale
and others ..Appellants

vs.

1. Shri Dattu Rama Nale & Ors. ...Respondents

Shri Milind Deshmukh for appellants.

CORAM: S.C.DHARMADHIKARI J.
18th July, 2007

P.C.

1. The second appeal impugns the judgment of the lower Appellate Court refusing to interfere with the judgment and decree of the Trial Court dismissing the appellants' suit being Reg.Civil Suit No.172 of 1991 to the extent that the specific performance of the agreement of sale dated 23rd April, 1975 is denied.

2. The appellants/plaintiffs filed Reg.Civil Suit No.172 of 1991 for specific performance of the agreement of sale dated 23rd April, 1985 impleading the vendor Dattu Nama Nale as defendant no.1. Similarly, Reg.Civil Suit No.201 of 1991 was filed against the said Dattu by purchaser Sanjaykumar Kaswe and Rajendrakumar Kaswe impleading also the present appellants as defendants for permanent injunction to protect their possession.

3. It is not disputed before me that the two suits were tried together. Evidence was common. The appellants' case is that Dattu Nama and his father Nama Nale, now deceased, agreed to sell 60 R from Gat No.310 for consideration of Rs.11,000/- to the deceased Kedari Umaji Nale, father of Namdev (Appellant no.1) and others and accordingly executed the agreement for sale on 23rd April, 1975 by accepting Rs.10,000/- and gave possession of the suit property on that date itself. Remaining amount of Rs.1000/-, according to them, was paid on 21st March, 1977. The original owner agreed to bring permission from the Collector and execute the sale deed in their favour thereafter. It is their case that Dattu refused to execute the sale deed and that is how the suit was filed claiming specific performance and decree in the sum of Rs.10,000/- in lieu of specific performance.

4. That suit has been partly decreed in as much as relief of specific performance is refused to the appellants but the claim of refund of Rs.10,000/- with interest at 9% p.a. has been decreed.

5. Aggrieved by refusal to grant specific performance, the appellants approached the lower Appellate Court.

6. As far as Reg.Civil Suit No.201 of 1991 for permanent injunction is concerned, that was also decreed by the

Trial Court and the defendants to the suit i.e. the present appellants were restrained by an order of perpetual injunction not to disturb the possession of the plaintiffs to that suit, namely, Sanjaykumar Laxman Kasave and others in respect of the suit property i.e. 85 R of land from Gat No.310 from village Karha Wagaj (Baramati).

7. The appellants impugned that decree and two appeals were heard by the lower Appellate Court. The lower Appellate Court has observed that the appellants before me could not prove that they were put in possession of the suit land. Although, they came with the case that they are in possession since 1975, and were so, for about 16 years, no evidence to prove that case was produced. If they had paid Rs.11,000/-, then, nothing prevented them to approach the Court if the sale deed was not being executed by their vendor. It is, in these circumstances, that the version of the vendor was believed that the transaction was of a mortgage and not sale. More so, when the appellants/plaintiffs led evidence of the adjacent land owner to establish the possession.

8. Shri Deshmukh, learned Counsel appearing in support of the appeal, contends that the Courts below have completely misread and misconstrued the statement made on oath in as much as their vendors have never denied that the Agreement in question was not an Agreement for sale. This was not

the case in the suit filed by Sanjay and others in as much as they were not seeking specific performance of their agreement but their claim was only that they were in possession and the same should be protected. While doing so, they rely upon the sale deed dated 27th February, 1991. However, as far as the agreement of sale in favour of the plaintiffs/present appellants are concerned, their vendor has not led any evidence to show that the transaction was not of sale but mortgage. This being the position, according to Shri Deshmukh, it was incumbent upon the plaintiffs in Reg.Civil Suit No.201 of 1991 to allege and prove that they are bonafide purchasers for value without notice of the prior agreement for sale executed in favour of the present appellants.

9. In my view, the contentions which are raised before me are nothing but an attempt to have reappreciation and reappraisal of the material produced. The lower Appellate Court has clearly held that the appellants before me were not in possession. The registered sale deed dated 27th February, 1991 which was executed by the appellants' vendor in favour of Sanjay kumar would take precedence over the alleged agreement in favour of the present appellants. Firstly, the agreement of 23rd April, 1975 was held not to be a contract for sale of land. Secondly, when the appellants were not able to show any document which would evidence their possession from 1975 to 1991

and their version was conflicting it was rightly disbelieved the lower Appellate Court in paras 14 and 15 of the impugned judgment has observed thus:

"14. According to plaintiffs in R.C.S.No.172/91 (Namdeo Kedari Nale and others) that the land sold to defendant no.2 i.e. Sanjay Kasave and Rajendra Kasave is quite different than the land agreed to be sold to them, but their original pleading shows that the land which was agreed to be sold to them by Dattu Rama Nale and their father as per an agreement dated 23.04.75 the same land was sold to defendant no.2 on 27.2.91 and, therefore, there is absolute no substance in the submission of plaintiff Namdev Nale that the land sold to defendant no.2 is quite different. Even it is seen from the cross examination of defendant no.1 that plaintiffs have put up a quite different version. A suggestion is given to defendant no.1 Dattu Rama Nale that 60 R portion is still in the possession of plaintiffs and 25 R portion is in the possession of defendant no.2; however, their possession is contrary to the entries in the record of rights.

15. I have already held that plaintiffs Namdeo Kedari Nale and others have miserably failed to prove their possession over the suit land since the

date of an agreement to sale i.e. from 23.4.75 and when it is proved by defendant no.2 (i.e. plaintiffs in R.C.S.No.201/91) that they have purchased the suit land from Dattu Rama Nale and since then they are in the possession of suit land; I hold that the lower Court has rightly dismissed the claim of the plaintiffs for obtaining relief of specific performance of the contract and rightly directed the vendor (Dattu Rama Nale (i.e. defendant no.1) to refund the amount of Rs.11,000/90 to the plaintiff Kedari Umaji Nale."

10. These are pure findings of fact based upon oral and documentary evidence led before the Courts below. If the appellants have lost in their claim for specific performance of the agreement they have themselves to blame. They waited till their vendor executed the sale deed in favour of Sanjay and others. They have also waited till the fact of registration of the sale deed. It is in such circumstances that the Courts below have found that the relief of specific performance cannot be granted. It is denied on the basis that specific performance being discretionary relief, the discretion cannot be exercised in the peculiar facts of this case in favour of the appellants. The Court below was, therefore, right in restricting the claim of the appellants and awarding them a decree insofar as refund of Rs.10,000/- with 9%

interest. That decree has become final even after appeals. In such circumstances, no substantial question of law is raised. This is not a court of further appeal. Appeal is, therefore, summarily dismissed.

(S.C.DHARMADHIKARI J.)